IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-750

SEARS, ROEBUCK AND CO.

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

JERRY J. WILLIAMS
BRUNDAGE, WILLIAMS & ZELLMANN
P. O. Box No. 3172
3746 Fifth Avenue
San Diego, CA 92103
Attorneys for Respondent

ARTS & CRAFTS PRESS, SAN DIEGO, CALIF.

INDEX

AUTHORITIES CITED

Cases

AUTHORITIES CITED (cont'd)

Cases (cont'd)

Statutes

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-750

SEARS, ROEBUCK AND CO.
Petitioner,

VS.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent, San Diego District Council of Carpenters, respectfully prays that the Petition for Writ of Certiorari to review the judgment of the Supreme Court of California entered in this case on September 2, 1976, be denied.

OPINION BELOW

Petitioner correctly states the relevant opinions below. See Petition, Appendices A-E.

JURISDICTION

The jurisdictional requisites are set forth in the Petition (p. 2). This Court has jurisdiction under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Should state courts be allowed to enjoin peaceful labor organization picketing on the basis of local trespass laws as a further exception to the *Garmon* doctrine of federal preemption?

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. Sections 151 *et seq.;* California Labor Code, Section 923, reprinted as Appendix A hereto; California Penal Code Section 602 as set out in the Petition (Appendix F, p. A47); and Section 552.1 of the California Penal Code, reprinted in Appendix B hereto.

STATEMENT OF THE CASE

Sears, Roebuck and Co. ("Sears") owns and operates a retail department store in Chula Vista, California. The store building, its abutting walkways and a spacious parking lot on three sides occupy an entire city block, bounded by a public sidewalk on all four sides. There are parking and traffic control signs identical to those of the municipality posted at the curbs and throughways of Sears. Anchored to the Sears' sidewalk is a conventional red, white and blue United States mailbox to which the public has unqualified access.

In late October of 1973, the San Diego District Council of Carpenters ("Union") was informed that Sears was performing carpentry in its Chula Vista store. On October 24, 1973, two business representatives of the Union met with the manager of the Sears Chula Vista store and requested that the carpentry work be contracted through a legitimate building trades contractor who would utilize qualified Union-dispatched carpenters; or in the

alternative, that Sears sign a short form collective bargaining agreement with the Union. The Sears manager assured the Union agents that he would look into the matter and get back to them by the next day. However, the Sears manager failed to advise the agents and repeated attempts to contact the manager proved unavailing.

Compelled to publicize the fact that Sears was undercutting prevailing standards for the employment of carpenters, the Union established a picket line on October 26, 1973, at the Sears Chula Vista store. The pickets patrolled on and near the walkways abutting the Sears building, never interfered with vehicular or pedestrian traffic, and were at all times peaceful and unobtrusive. However, Sears demanded of the Union that the pickets leave, claiming that the entire city block occupied by its Chula Vista store was private property and that the pickets were trespassing. The Union politely declined to do so, absent judicial proscription.

Sears then sought an injunction in the San Diego Superior Court from which a temporary restraining order issued on October 29, 1973, ordering the removal of Union pickets from the city block occupied by Sears. The Union complied immediately and relocated its pickets on the public sidewalks nearest to the Sears-occupied property, a distance in excess of 200 feet from the Sears store. At this distance, the pickets were generally out of view of the shopping public, and as a result the picketing program was terminated as ineffective on November 12, 1973. A preliminary injunction, in substantially the same form as the temporary restraining order, issued on November 21, 1973.

The California Court of Appeal twice affirmed the issuance of the preliminary injunction (See Petition, Appendices B and D, pp. A4, A15). The California Supreme Court ultimately re-

versed, holding that federal law pre-empted state court jurisdiction over the labor dispute under *San Diego Building Trades* v. *Garmon*, 359 U.S. 236 (1959), in that the Union picketing enjoined by the superior court was arguably protected by Section 7 or prohibited by Section 8 of the amended Labor Management Relations Act (hereinafter "the Labor Act") and therefore within the exclusive jurisdiction of the National Labor Relations Board. (See Petition, Appendix E, p. A31.)

At no time did Sears seek relief under the Labor Act, either by filing unfair labor practices charges, petitioning for an election, or otherwise.

ARGUMENT

A. The Same Result Below Would Be Reached On Independent State Grounds.

Notwithstanding the *Garmon* doctrine of federal pre-emption, the state of California, both by action of the Legislature and judicial doctrine, has exempted labor disputes from state trespass laws. California Penal Code Sections 602, 552.1; *Schwartz-Torrance Investment Co.* v. *Bakery and Confectionary Workers, Local 31*, 61 Cal.2d 766 (1964); *In re Zerbe*, 60 Cal. 2d 666 (1964); *Musicians Union Local No. 6* v. *Superior Court*, 69 Cal.2d 695 (1968).

In *Schwartz-Torrance*, 61 Cal.2d at 769, the California Supreme Court noted that the state Legislature had "specifically subordinated the rights of the property owner to those of persons in lawful labor activities," citing *In re Zerbe*, 60 Cal.2d at 668, and that this legislative act was entirely consistent with the public policy of the state of California as expressed in Labor Code Section 923.

Earlier, the California Supreme Court had construed Labor Code Section 923 to justify a policy of judicial abstention with respect to labor disputes. *Messner* v. *Journeymen Barbers etc. International Union*, 53 Cal.2d 873, 4 Cal.Rptr. 179 (1960); *Petri Cleaners* v. *Automotive Employees etc.*, 53 Cal.2d 455, 2 Cal.Rptr. 470 (1960). In both *Messner* and *Petri* the court refused to interfere in intrastate labor disputes on the ground that the public policy of the state as reflected in Section 923 favored the resolution of labor disputes by the free interaction of economic forces, without judicial interference, *Messner*, supra, at 880; and also because California had no "little Taft-Hartley Act" with which to evaluate the merits of labor disputes or order elections. *Messner*, supra at 882, *Petri*, supra at 474.

B. The Court Below Correctly Interpreted the Decisions of This Court in Holding That Trespass Is Not an Exception to the *Garmon* Doctrine.

(1) In *Garmon*, this Court declared that both state and federal courts must yield to the exclusive competence of the National Labor Relations Board in any matter arguably protected or prohibited under the Labor Act. State courts would, however, continue to have jurisdiction over activities of "merely peripheral concern" to the Labor Act or involving conduct which "touches interests so deeply rooted in local feeling and responsibility," that the states are not deprived of the power to act. 359 U.S. at 243-244. Picketing is undeniably a protected activity, *Garner* v. *Teamsters Union*, 346 U.S. 485, 500 (1953), and as such is not subject to state court jurisdiction.

Nor would a "trespass exception" to *Garmon* foreclose the hiatus described by Chief Justice Burger in *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, 227 (1970) (concurring opinion).

and urged upon this Court by Petitioner. (Petition, p. 8.) Indeed, the reverse may be true in such states as California, as an employer would be afforded no greater legal redress to protect his private property rights than he now enjoys, by virtue of California Penal Code Sections 602 and 552.1 as judicially construed. See, *In re Zerbe*, supra; *Schwartz-Torrance*, supra; *Musicians Union Local No. 6*, supra. In other states (See Petition, pp. 6-7 fn. 2), "trespassory" labor organization picketing, which is the subject of this action, might be prohibited or restrained. Thus the diversity of application of state trespass laws to labor organizations would exacerbate the very hiatus which Petitioner claims to fear.

(2) This Court has dealt with the claim of a "trespass" exception to *Garmon* on numerous occasions and the issue is well settled. In *N.L.R.B.* v. *Babcock and Wilcox*, 351 U.S. 105, 112 (1956), this Court held that where the rights granted workers under authority of the national government—here section 7 of the Labor Act—compete with private property rights, then "accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." In addition, this Court emphasized, "the determination of the proper adjustments rests with the Board." *Id.* at 112. This holding has been reaffirmed as recently as 1975 in this Court's decision in *Hudgens* v. *N.L.R.B.*, 424 U.S. 507, 521 (1975), in which this Court observed that while both *N.L.R.B* v. *Babcock and Wilcox*, supra, and *Central Hardware Co.* v. *N.L.R.B.*, 407 U.S. 539 (1971) involved labor organizational activities, other section 7 rights "may or may not be relevant in striking the proper balance." *Hudgens*, supra at 521. In reaching this accommodation, this Court again held "the primary responsibility . . . must rest with the Board in the first instance." *Id.*

Clearly, to allow a State Court to apply local trespass laws would vitiate the rationale of *Hudgens* which reaffirms this Court's holding that it is the N.L.R.B. and not the States which must strike the balance between section 7 rights and property rights. As the California Supreme Court itself observed in *Messner*, supra, state courts are ill-equipped to make the kinds of determinations required by the Labor Act. 52 Cal.2d at 882-883. The lack of appropriate apparatus or simply an erroneous decision by the State Court could result in the substantial denial of rights the N.L.R.B. recognizes, considers, and may find dispositive. See Cox, "Labor Law Preemption Revisited," 85 Harv.L.Rev. 1337, 1361-1362 (1972). The mandate of accommodating "the employer's business and proprietary interests against the need for organizational and strike opportunities is peculiarly an N.L.R.B. function," Cox, at 1362, and should continue to remain so.

(3) Under the recent decision of *Machinists and Aerospace Workers* v. *W.E.R.C.*, ... U.S. ....., 44 U.S.L.W. 5026 (1976), this Court noted that cases involving federal preemption fall into one of two categories. The first is where one forum would enjoin as illegal certain conduct which the other forum would find legal. The second is where State Courts would restrict the exercise of rights guaranteed by federal acts. *Auto Workers* v. *Russell*, 356 U.S. 634, 644 (1958). The first category is specifically contemplated by *Garmon* and its history summarized in *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 290-291 (1971). See *Machinists and Aerospace Workers* v. *W.E.R.C.*, supra, at 5028.

The latter category addresses itself to situations where the conduct involved should be unregulated and left to the "free

play of economic forces." *Machinists and Aerospace Workers* v. *W.E.R.C.*, supra at 5028; *N.L.R.B.* v. *Nash-Finch Co.*, 404 U.S. 138, 144 (1971); Lesnick, "Preemption Reconsidered: The Apparent Reaffirmation of *Garmon*," 72 Col.L.Rev. 469, 478, 480 (1972). Assuming, *arguendo*, that trespass is neither a protected nor prohibited activity, there still remains the question whether "Congress occupied the field and closed it to State regulation." *Teamsters Union* v. *Morton*, 377 U.S. 252, 258 (1964). There can be little doubt that to permit an exception of trespass to the doctrine of federal preemption would seriously disrupt the balance of economic weaponry currently available to each side. *Machinists and Aerospace Workers* v. *W.E.R.C.*, supra, at 5030. This view has been maintained since 1953, where this Court in *Garner* v. *Teamsters Union*, supra, at 500, declared:

> "[I]t is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the State were to declare picketing free for purposes or by methods which the federal act prohibits."

In *Machinists and Aerospace Workers* v. *W.E.R.C.*, supra, at 5030, this Court delineated the focus of the inquiry regarding preemption, when self-help economic activities were employed, to be whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the act's processes." *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1968).

Picketing has long been recognized as a labor organization's primary economic weapon. *Garner*, supra; *Machinists and Aerospace Workers* v. *W.E.R.C.*, supra; *Hudgens*, supra. To deprive the Union of the right to picket at the only location where it

might have an effect—the place of the involved business—would be to deny "to one party to an economic contest a weapon that Congress meant him to have available." *Machinists and Aerospace Workers* v. *W.E.R.C.*, *supra* at 5031; Lesnick, *supra* at 478.

CONCLUSION

For all the foregoing reasons, San Diego District Council of Carpenters respectfully prays that the Petition for a writ of certiorari be denied.

Respectfully submitted,

JERRY J. WILLIAMS
BRUNDAGE, WILLIAMS & ZELLMANN
3746 Fifth Avenue
San Diego, CA 92103
Attorneys for Respondent

APPENDIX A

APPENDIX A

CALIFORNIA LABOR CODE

* * *

DIVISION 2. Employment Regulation and Supervision

* * *

Part 3. Privileges and Immunities

Chapter 1. Contracts Against Public Policy

§ 923. Public policy as to labor organizations and collective bargaining

In the interpretation and application of this chapter, the public policy of this State is declared as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Enacted 1937

APPENDIX B

APPENDIX B

CALIFORNIA PENAL CODE

* * *

Title 13. Crimes Against Property

* * *

Chapter 12. Unlawful Interference With Property

Article 1. Trespassing or Loitering near Posted Industrial Property.

* * *

§ 552.1 Labor union activity: Investigation of working conditions

(a) Any lawful activity for the purpose of engaging in any organizational effort on behalf of any labor union, agent, or member thereof, or of any employee group, or any member thereof, employed or formerly employed in any place of business or manufacturing establishment described in this article, or for the purpose of carrying on the lawful activities of labor unions, or members thereof.

(b) Any lawful activity for the purpose of investigation of the safety of working conditions on posted property by a representative of a labor union or other employee group who has upon his person written evidence of due authorization by his labor union or employee group to make such investigation.